

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARTLAND PLYMOUTH COURT)

MI, LLC, d/b/a HEARTLAND HEALTH CARE)

CENTER – PLYMOUTH COURT,)

Petitioner/Cross-Respondent,)

vs.)

NATIONAL LABOR RELATIONS BOARD,)

Respondent/Cross-Petitioner.)

Nos. 15-1034 and 15-
1045

**NATIONAL LABOR RELATIONS BOARD’S SUR-REPLY IN
OPPOSITION TO PETITIONER’S MOTION FOR ATTORNEYS’ FEES**

Based on information and arguments raised for the first time in the Reply filed by Petitioner Heartland Plymouth Court MI, LLC (“Heartland”), the National Labor Relations Board (the “Board”) hereby reasserts its opposition to Heartland’s motion for attorneys’ fees under the Equal Access to Justice Act (“EAJA”), and further clarifies why Heartland’s motion should be denied.

Heartland has still failed to carry its burden under EAJA to show that it is the real party in interest that incurred the fees it seeks. *See Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985). The cases cited by Heartland are inapposite because in each of those cases, the government was seeking to

aggregate the net worth of the claimant and a different entity in order to disqualify the claimant from eligibility. *See Tri-State Steel Constr. Co. v. Herman*, 164 F.3d 973, 978-80 (6th Cir. 1999) (rejecting agency's attempt to in essence "pierc[e] the corporate veil" and aggregate net worth based on corporate parent's mere *ability* to advance litigation funds); *Caremore, Inc. v. NLRB*, 150 F.3d 628, 629-30 (6th Cir. 1998); *Tex. Food Indus. Ass'n v. U.S. Dep't of Agric.*, 81 F.3d 578, 580-82 (5th Cir. 1996).¹ Here, however, Heartland has failed to meet its burden of demonstrating that it actually "incurred" the fees, an issue that is distinct from the aggregation issues in the cases cited by Heartland.

In its Reply, Heartland now acknowledges that it was not directly billed for any of the fees or costs it is requesting, which were "incurred on [its] behalf." (Affidavit of Kathryn Hoops ("Hoops Aff.") at ¶7). It has now further revealed that Heartland did not even approve the legal fees it seeks. Rather, the fees are reviewed, approved, and paid by Heartland's parent corporation, HCR ManorCare,

¹ Although the Sixth Circuit in *Tri-State Steel* cited a district court EAJA case awarding fees originally "advanced" by a corporate parent, in that case, the district court noted that the subsidiary had directly paid \$62,735 out of the \$69,636 in claimed legal fees. *Germano-Millgate Tenants Ass'n v. Cisneros*, 855 F. Supp. 233, 235 (N.D. Ill. 1993). Thus, in that case, it was much clearer that the subsidiary was the real party in interest.

Inc., and a third-party subsidiary, HCR Manor Care Services, LLC (collectively “HCR”). (*Id.* at ¶6.)²

The contention that Heartland is nonetheless entitled to an award of fees, simply because HCR later “charges” legal expenses on its subsidiaries’ profit and loss statements, is untenable. As this Court explained in *Unification Church*, the congressional intent motivating EAJA was not the protection of large entities, but instead, to limit payment to:

individuals or to small entities that find particularly burdensome the ever-rising costs of litigation. *See Award of Attorneys' Fees Against the Federal Government: Hearings on S.265 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee*, 96th Cong., 2d Sess. 56 (1980) (testimony of Rep. McDade) (describing plight of “the small business owner” and his “hometown attorney” or “family lawyer”); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), U.S. Code Cong. & Admin. News_1980, 4953, 4988 (“The [bill] focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights.”). The converse of this concern is a desire not to subsidize through subsection (d) the purchase of legal services by large entities easily able to afford legal services.”

762 F.2d at 1082. Thus, permitting Heartland to recover EAJA fees here because HCR “charged” such expenses to it via largely discretionary internal accounting practices would “open the door to wholesale subversion of Congress’ intent to prevent large entities from receiving subsidies under subsection (d).” *Id.*

² According to the Hoops Affidavit (¶3), HCR Manor Care Services, LLC is responsible for obtaining and managing third-party legal services for the parent corporation’s subsidiaries, among which include Heartland.

Moreover, the Hoops Affidavit fails to show that Heartland itself had a binding legal obligation to pay the law firm retained by HCR, or that Heartland actually controlled and directed the litigation in this case. *See Nat'l Ass'n Mfrs. v. Dep't of Labor*, 159 F.3d 597, 603 (D.C. Cir. 1998) (“We also would not preclude the possibility that the [real-party-in-interest] principle could apply when an ineligible non-party controls the litigation decisions of an eligible party, even if it does not finance the litigation itself.”). To the contrary, Heartland admits (Reply at p. 2) that “HCR manages legal services for its subsidiaries” and, further, that new legal matters—such as the present litigation—are first approved by HCR. (Hoops Aff. at ¶4.) All bills for legal expenses are also reviewed and approved by HCR. (*Id.* at ¶6.) The lawyers representing Heartland are retained by and bill “HCR Manor Care” as the “client.” (Motion Ex. B.) Certain documents filed by separate HCR subsidiaries in two parallel EAJA actions currently pending against the Board are virtually identical.³ Consequently, Heartland has failed to show that it, and not HCR, is controlling the litigation and making the key decisions in this matter. *Cf.*

³ Compare Petitioner’s Motion for Attorney Fees pp. 3-4 & 8 and attached Affidavits of Jon Stipanovich and Clifford H. Nelson; Petitioner’s Reply to NLRB’s Response to Motion for Attorney Fees pp. 1-2 and attached Affidavit of Kathryn Hoops, *Heartland Plymouth Court MI, LLC v. NLRB*, D.C. Cir. Nos. 15-1034 & 15-1045, with Petitioner’s Motion for Attorney Fees pp. 3-4 & 6-7 and attached Affidavits of Robert Nealon and Clifford H. Nelson; Petitioner’s Reply to NLRB’s Response to Motion for Attorney Fees pp. 1-2 and attached Affidavit of Kathryn Hoops, *ManorCare of Kingston PA, LLC v. NLRB*, D.C. Cir. Nos. 14-1166 & 14-1200.

Edens Technologies, LLC, v. Kile Goekjian Reed and McManus, LLC, 675 F. Supp. 2d 75,83 (D.D.C. 2009) (in determining validity of assignment of interest, where a party did not “control the litigation,” “wield all the decision-making power,” or “select the attorneys,” it was not the real party in interest). This Court should accordingly refuse to award EAJA fees to Heartland, which has not been shown to be the real party in interest.

For the foregoing reasons, Heartland’s motion should be denied.

Respectfully submitted,

DAWN L. GOLDSTEIN
Deputy Assistant General Counsel

DAVID H. MORI
Supervisory Attorney

/s/ Paul A. Thomas
PAUL A. THOMAS
Attorney

Contempt, Compliance,
and Special Litigation Branch
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-3788
paul.thomas@nlrb.gov

DATED: July 18, 2016
Washington, D.C.